

EXHIBIT A

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Thomas S. Hixson, Magistrate Judge
4
5 EPIC GAMES, INC.,)
6 Plaintiff,)
7 vs.) Case No. C 20-05640-YGR
8 APPLE, INC.,)
9 Defendant.)
10 _____)

11 San Francisco, California
Thursday, August 8, 2024

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
RECORDING 9:13 - 10:18 = 65 MINUTES

14 APPEARANCES:

15 For Plaintiff:

Cravath, Swaine & Moore, LLP
375 Ninth Avenue
New York, New York 10001
GARY A. BORNSTEIN, ESQ.

18 | For Defendant:

Gibson, Dunn & Crutcher, LLP
One Embarcadero Center
Suite 2600
San Francisco, California

8.1

Gibson, Dunn & Crutcher, LLP
333 S. Grand Avenue
Los Angeles, California 90071
JASON C. LO, ESO.

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4 Transcribed by: Echo Reporting, Inc.
5 Contracted Court Reporter/
Transcriber
echoreporting@yahoo.com

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1 Thursday, August 8, 2024

9:13 a.m.

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3 --oo--

4 THE CLERK: All right, everyone. We are here in
5 Civil Action 20-5640, Epic Games, Inc. versus Apple, Inc.,
6 the Honorable Thomas S. Hixson presiding.

7 Counsel, please state your appearances for the record.
8 Let's start with Plaintiff's counsel.

9 MR. BORNSTEIN (via Zoom): Good morning, your
10 Honor. Gary Bornstein from Cravath. I'm here for Plaintiff
11 Epic Games.

12 THE COURT: Good morning.

13 MR. PERRY (via Zoom): Good morning, your Honor.
14 Mark Perry from Weil. I'm here for Apple.

15 THE COURT: Good morning.

16 MR. LO (via Zoom): Good morning, your Honor.
17 Jason Lo and Dana Craig, from Gibson Dunn, also on behalf of
18 Apple.

19 THE COURT: Good morning.

20 We are here on three joint discovery letter briefs, and
21 I think we can discuss them in order. The first one is ECF
22 1000, which raises two issues. The first is the time frame
23 for the discovery period, and it looks to me like Judge
24 Gonzalez Rogers has ruled on this issue already on the
25 transcript of the May 31st hearing at page 914 where counsel

1 for Apple asked for a time parameter for the Court's ruling,
2 and she said from the day that her decision came out until
3 the present. If we think that the present is the day that
4 she said that, then it would seem that the time period is
5 September 10, 2021 to May 31st, 2024. I know that Apple
6 resists that conclusion. So, why don't I turn it over to
7 Apple.

8 MR. PERRY: Thank you, your Honor. And, with the
9 Court's permission, I will address the first -- the issues
10 in the first one, and Mr. Lo will address the issues in the
11 other two submissions, just --

12 THE COURT: That's fine.

13 MR. PERRY: Thank you. You're absolutely right,
14 your Honor. We had that discussion with Judge Gonzalez
15 Rogers in the context of a larger discussion involving the
16 scope of the document production.

17 As the Court will recall from our first meeting, Epic
18 did not seek any discovery in connection with this
19 proceeding. The injunction was -- the injunction compliance
20 program was announced on January 16th, 2024. Epic
21 immediately that same day publically announced that Apple is
22 not in compliance and that it intended to sue, and it
23 brought this lawsuit without seeking any discovery and told
24 Judge Gonzalez Rogers that same day in the transcript that
25 it didn't think it needed any discovery to make out its

1 claims.

2 As the evidentiary hearing progressed, the Court had --
3 Judge Gonzalez Rogers had some questions regarding the
4 documentary basis for the witnesses' testimony. Certain
5 documents were produced during trial, and on the last day,
6 May 31st, the Court ordered the production we're now
7 conducting of all documents relative to the decision making
8 process.

9 And our -- our understanding or our view is based in
10 the context of that, including the two very specific orders
11 setting out the parameters of the document production, for
12 example, all documents relative to the decision making
13 process, that process ended on January 16th, 2024. No
14 decisions were made. The project hasn't changed. The
15 parameters haven't changed. The framework hasn't changed
16 since then. And we believe that's the -- the appropriate
17 cutoff for the decisions that are being at the issue here.

18 We do, of course, recognize the statement in the
19 transcript regarding the present. We -- we understand the
20 present to be the present of the framework, that is, January
21 16th, can be read both ways. We totally understand that.
22 We will do it both ways. It will -- it will expand the
23 scope of the production and the time it will take to
24 complete it if we have to add five more months. That's just
25 reality. So, I mean, we can do it either way. We think the

1 law of diminishing returns kicks in, but -- but that's our
2 position.

3 THE COURT: All right. Well, if Epic wants to
4 test the effects on competition of the way Apple implemented
5 the injunction, wouldn't it need some evidence from after
6 the Apple -- the new measures went into effect?

7 MR. PERRY: Your Honor, we -- we would be happy to
8 discuss with Epic any targeted requests for post-
9 implementation information. The only one they've identified
10 is the number of developers adopting the program. We've
11 already provided that as of May. We'd be happy to update
12 that or any other specific information. I don't -- I don't
13 think that's what's at issue. This is a massive custodial
14 search, 52 custodians going through all of their server side
15 information, all of their shared depositories, you know,
16 every bit and byte that these 52, you know, executives and
17 employees of apple have on an ongoing basis so that every
18 day there is additional material being added that, you know,
19 is probably not relevant, probably not responsive but would
20 have to be searched anyway.

21 We are more than happy to engage with Epic on any
22 targeted post-implementation request. That would be fine
23 with us. It's the continuation of the custodial search that
24 causes the, you know, expansion of scope and -- and time
25 delay and expense, frankly, that we are concerned about.

1 THE COURT: I see. Well, I'm not going to say
2 that Apple has to produce through the present, meaning
3 today, or through some, you know, unbounded time frame. I
4 -- I would think that -- and Epic isn't asking for that.
5 They're asking only through May 31st.

6 So, why don't I turn to Epic and hear your response,
7 please.

8 MR. BORNSTEIN: Thank you, your Honor. I really
9 don't have much to add to the Court's comments at the outset
10 of this portion of the discussion. We believe there is an
11 order from Judge Gonzalez Rogers on the record in open court
12 in response to a direct question from counsel for Apple
13 about the scope of her order. And we believe that that
14 order from the Court should be followed.

15 The references that Apple has made to a subsequent
16 minute order and a possible interpretation of how you could
17 read that order when it doesn't actually speak to the
18 question of time period is, in our view, simply trying to
19 wiggle out of the response to a direct question that the
20 Court gave in open court.

21 THE COURT: All right. Let's turn to the next
22 issue, which is a deadline for substantial completion of
23 document production, and I would like to turn to Apple.

24 Can you please give me a status update on where you are
25 in terms of collecting from the custodians. I believe you

1 said it was 52 custodians, and in the letter briefs, there
2 are references to approximately 650,000 documents, but I
3 would appreciate a status update as to where you are in
4 terms of collecting from the custodians and interviewing the
5 custodians and identifying any noncustodial sources if they
6 are -- if there are any.

7 MR. PERRY: Absolutely, your Honor. If I can just
8 give a bit of an overview of sort of what's happened up
9 through today, I think it would be helpful.

10 THE COURT: I agree. That would be helpful.
11 Thank you.

12 MR. PERRY: So, we have first reached agreement
13 with Epic on, we believe, the vast majority of this project,
14 which is 52 custodians, 51 -- it turns out one has left the
15 company before the -- before the date in question. And
16 we've agreed to nearly 100 search terms. There's four or
17 five that Mr. Lo will discuss later, but, you know, we -- we
18 reached agreement on the search terms and on the custodians.
19 We also reached an agreement on a specialized or a custom
20 collection and review of folders related to injunction
21 compliance, including collaborative data sources such as
22 Quip and Box. I'm going to talk about that in a minute, but
23 that was in addition to the, you know, computerized search
24 term search. This is a -- a manual search that I -- I will
25 describe.

1 We did an initial step one phase, as the Court may
2 recall from the last time, involving a witness named Carson
3 Oliver who testified at the hearing, and we were directed to
4 produce certain materials from him. That really helped us
5 scope the work as to first getting the server side
6 documents, the emails and -- and other materials that can be
7 pulled directly from the system.

8 More importantly, Epic requested -- and we agreed at
9 the end of the day -- to "chase" -- e-Discovery term -- all
10 the links in the Box files that were maintained, boxes of
11 program that -- that maintains files. That has been a very
12 labor intensive project. We've had to go to either other
13 employ -- at least eight other employees to get these Quip
14 and Box files just from Mr. Oliver. And, again, we're not
15 complaining about that. We're just -- it's just a -- it's a
16 manual process to do that. It can't be searched on the
17 server side like emails can. It -- it has added to the
18 project.

19 We have -- on phase two, which is the main production,
20 we have developed a significant, you know, protocol set,
21 including responsiveness, privilege, relevance,
22 confidentiality, PII, all the things that you would expect.
23 Your Honor, in this case, there is a significant privilege
24 issue as we discussed last time. All of this work was done
25 in order to comply with the Court's injunction. Therefore,

1 the legal department, both inside the company and outside
2 counsel, were involved in virtually every process so that
3 there are on the front end detailed privileged, you know,
4 flag and -- and parameters issues. On the back end, there
5 will be escalated review for far more than the usual number
6 of documents given the nature of the privileged calls.

7 We are most of the way through the custodial
8 interviews. Epic -- we -- we discussed this with Epic,
9 having a custodial interview for every custodian. We have
10 done the initial interviews with at least 35 of them as of
11 yesterday and scheduled follow ups with the majority of
12 them. Those have taken on average 90 minutes, and they --
13 as I said, they will have follow ups. The others are all
14 scheduled. They are -- they're literally happening -- there
15 are some today.

16 A -- they have been very substantive, including at
17 Epic's request, questions regarding compliance related
18 materials and locations that might not be picked up in the
19 server side review.

20 It's come out to more than three hours per custodian,
21 but then that's -- as I said, we're almost done with that.
22 We have in the meantime -- we have pulled all the available
23 documents from the servers based on the search terms and
24 these custodians that we've agreed to. It is north of
25 600,000. I -- the exact count is something like 650,000. I

1 don't want to give you a very precise number because I get
2 it a couple of different ways, but it's something like that.
3 That review has begun using the search terms and the -- or
4 it's on -- more than begun. It's underway, using the search
5 terms. And, of course, that's documents with families and
6 -- and attachments and so forth.

7 To give the Court a sense of what we are doing, we have
8 seven in house counsel and e-Discovery specialists working,
9 you know, a significant amount of their time on this, 15
10 outside counsel doing the same, and 150 contract reviewers
11 who have all been trained and are reviewing these documents
12 at the first level. This is a massive undertaking, your
13 Honor. Since -- since that May 31st order, just to give you
14 a sense, at least 1500 outside counsel hours devoted to this
15 -- this project and -- and doing the interviews and the
16 protocols and the -- and the scoping, hundreds if not
17 thousands of hours from the in house e-Discovery team at
18 Apple, which, you know, has not just this case but many
19 other big litigations to handle.

20 These are professionals. Ms. Craig, who's on the line,
21 is an e-Discovery expert. The -- the e-Discovery team at
22 Apple is fully engaged with this as well, and -- and, as we
23 said, we have a vendor with 150 reviewers working on it as
24 well.

25 The process is going. You know, we -- we have it

1 underway. But the longest part that I predict, in addition
2 -- you know, the -- the search has to be done in the usual
3 way or the -- the collection is done -- the service side
4 collection is done. The longer part here is going to be
5 these collaborative data sources that Epic has requested and
6 we agreed to because they have to be manually reviewed and
7 -- and chased. That is under way for the custodians. And
8 the privilege review is going to take longer. We're already
9 seeing significant privilege flags, and those do require, as
10 the Court may expect, you know, human review, often outside
11 counsel review, sometimes inside counsel review, depending
12 on the nature of it.

13 That's where we are today. I mean, I -- we are --
14 subject to the issues that Mr. Lo is going to discuss with
15 the Court, we are confident that we can get to substantial
16 completion by early December given the scope of what we
17 know, the custodians we've interviewed, the number of
18 documents we have, the perimeters and the -- and the
19 privilege issues. We are not confident we could get it done
20 faster than that. I mean, we -- we -- we have a lot of
21 resources devoted to this, and it is going to take that many
22 people, you know, that much time to get it done is our best
23 assessment having, you know, fully scoped the project to
24 this point. This is not a -- I mean, we're not done, but we
25 have not -- we've got our arms around it now. We know what

1 it looks like. And, as I described just now, that is the --
2 the nature of the -- the project.

3 THE COURT: Okay.

4 MR. PERRY: Does that answer the question? I'm
5 happy to give more details, but that -- that's the overview.

6 THE COURT: Okay. Thank you. I appreciate that
7 overview. I find that helpful.

8 Let me turn to Epic for your argument about when Apple
9 should be ordered to substantially complete its document
10 production.

11 MR. BORNSTEIN: Thank you, your Honor.

12 I'll start by saying just by way of background in terms
13 of what we have received so far, the answer is in the past
14 two months, we've received nothing. We got two documents,
15 to be fair, two documents at the end of June. But, aside
16 from that, since June 14th, we have received literally zero
17 beyond those two from Apple.

18 So, we're now over two months from the May 31st
19 hearing, at which we took a break at the judge's instance so
20 that Apple could consult on its side about how long it would
21 take to complete this production. And your Honor has
22 obviously looked at the transcript and, so, is aware that
23 after the break, Apple assumed that there would be about 50
24 custodians, which assumption turned out to be correct.
25 Apple was fully aware of the scope of the review. Apple was

1 fully aware of the privilege issues that Mr. Perry just
2 described, and with full knowledge of what it was facing,
3 Apple told Judge Gonzalez Rogers in court that it expected
4 it would take three months.

5 Now, in fairness, that was an estimate at the time, and
6 I recognize people can't be absolutely held to that, but I
7 have every expectation that that was not just a guess in the
8 circumstances where the Court had asked for this expressly,
9 and Apple was well aware of what the issues were. Apple
10 spent the time to give an answer. And now we are two months
11 and a week into that three-month period, and we have
12 received nothing beyond approximately 1900 documents that we
13 got on June 14th, which were part of, although not all of,
14 what the parties have been referring to as the step one
15 production.

16 So, that's the context in which we approach this, in
17 addition to which it is very much in Apple's interest here
18 to delay production. The Court has already made -- Judge
19 Gonzalez Rogers has already made a preliminary finding or a
20 -- a finding that we have made a preliminary showing that
21 Apple is not in compliance with her injunction. At the
22 hearing, she asked some probing questions, and I recognize
23 one can't predict an outcome from a hearing, but the Judge
24 was certainly taking this matter very seriously, as well she
25 should. And it is in Apple's interest to put off as long as

1 it can a final resolution of this matter, and I believe that
2 is what is happening.

3 So, we have gotten over the course of these two months
4 and a week, almost nothing. We believe Apple should be held
5 to its representation to the Court about how long it would
6 take to get this done. Nothing has changed from May 31st
7 until now other than we've learned only two-thirds of the
8 custodial interviews have even been done in over two months,
9 and this is news to me right now. Mr. Perry said they've
10 done only 35 interviews of the 52 custodians, maybe 51
11 because of the individual who's left the company. So, two-
12 thirds of the custodial interviews are completed, with one
13 -- with one-third remaining.

14 The suggestion the custodial interviews themselves are
15 somehow unduly burdensome because custodians need to be
16 asked about things other than email is simply incorrect.
17 We always ask custodians about other sources and other
18 repositories in which they may have relevant documents.
19 Otherwise, they're not doing their jobs. That's just part
20 of a custodial interview in the ordinary course.

21 And even setting aside whatever difficulties or special
22 circumstances may exist with respect to what Mr. Perry
23 referred to as chasing the links on these shared data
24 sources, we know that there are approximately 650,000
25 documents that have been already pulled from the emails, and

1 we've gotten none of them, literally none from that -- from
2 that set of materials. So, I don't know how to conclude
3 anything other than that Apple is dragging its feet here.
4 So, I do believe, in response somewhat circuitously, to your
5 Honor's question, that Apple should be held to its
6 representation to complete this within three months.

7 I am willing -- and I -- I recognize there was a period
8 of time where the parties discussed search terms and -- and
9 custodians, but those were almost entirely resolved as of
10 the middle of June, within about two weeks of the -- the
11 order we're discussing. So, three months from substantial
12 agreement on search terms and custodians would take us to
13 mid September, and we had in our papers suggested that Apple
14 be held to the end of August date. I -- I think mid
15 September is fine, is fair given the time we spent to land
16 on custodian search terms, but I do believe that's where we
17 should land, your Honor.

18 THE COURT: All right. Thank you.

19 And let me hear Apple's response.

20 MR. PERRY: Thank you, your Honor. Just a few
21 points. The estimate we gave Judge Gonzalez Rogers in
22 court, as Mr. Bornstein noted, she gave us 45 minutes to
23 caucus. We estimated at that time that a computerized
24 search, that is, a back-end server search of emails and
25 texts and the like, with agreed upon custodians and agreed

1 upon search terms, would take about three months. It would
2 have. We have added this additional layer of Boxes and
3 Quips that took the parties a significant time to work out.
4 We didn't even get the Epic search term and custodian
5 proposals until June 18th. We didn't have agreement until
6 July. I mean, again, I'm -- this is the nature of these,
7 but we got to agreement. We did agree to virtually other
8 requests. Once we had that agreement, the -- the gears
9 started rolling. The Court has seen these massive
10 productions. They do take time. The -- the protocols are
11 in place. The review is underway. The -- the custodial
12 interviews could not start until we had agreement on the non
13 -- non-ordinary sources, right, because, otherwise, we would
14 have to go back and do them again. Epic made a big deal
15 about this. We -- we had several hearing -- we had a
16 hearing about it with Judge Gonzalez Rogers. We had many
17 discussions. We came to an agreement. I want to be clear
18 on that, but once we came to the agreement, then we have to
19 go and ask nonstandard questions of these custodians. We
20 are doing things in a different way than we have in other --
21 in other cases.

22 In this very case, your Honor ruled, for example, in
23 the -- in the Pepper case, which applied in the earlier part
24 of the Epic case, that we only had to chase certain links if
25 they were identified by the parties and there was a

1 reasonableness limitation and agreement on -- on links.
2 That's not applying here. So, we have to go on a -- you
3 know, we -- again, I'm not complaining. It's just it --
4 it's a -- it expanded the scope. It expanded the time.

5 You know, we -- we have been rolling. That estimate --

6 THE COURT: I have a question for you.

7 MR. PERRY: Yes, your Honor.

8 THE COURT: For search Quip and Box, you described
9 that as manual searching. Does that mean, for example, that
10 Apple isn't using the search terms as part of those
11 searches?

12 MR. PERRY: So, there's -- there's two different
13 answers to that, your Honor, and I'm going to quickly get
14 out of my depth, and Ms. Craig is going to jump in and tell
15 me where I get it wrong.

16 There is an initial assessment of the Quip and Box
17 materials to determine whether they are relevant or, you
18 know, have materials related to this issue. If there is,
19 for example -- and this is a hypothetical, but if there is a
20 Box folder labeled "Epic Injunction Compliance", then our
21 agreement is to manually review all of the documents or the
22 materials within that folder rather than running search
23 terms on it. So, it -- you know, it is identifying --
24 manually identifying and search term identifying sources,
25 folders or their equivalence -- I think in terms of folders

1 because of my age -- and -- and then manually reviewing
2 those contents. That was Epic's request than we agreed to.
3 So, it -- it's different than the computerized search term
4 review of the email, and now I should pause and let Ms.
5 Craig -- because I'm sure I got part of that wrong. And I
6 apologize. I just -- I don't understand Box and Quip the
7 way my colleagues do. So, I've invited Ms. Craig to
8 supplement my answer.

9 MS. CRAIG (via Zoom): Your Honor, Mr. Perry got
10 it right. I would just add that because of this process, we
11 have to do essentially two different collections. We do the
12 collection of the sources that can have search terms run
13 through it, and then we do the collection that Mr. Perry
14 referred to, which is folders that appear to be fully
15 dedicated to the injunction compliance work. Those have to
16 be collected separately so we can track them and make sure
17 that the search terms aren't running through them and we do
18 a manual review of all of its contents.

19 THE COURT: Okay. Thank you. That's helpful. I
20 appreciate that.

21 Well --

22 MR. BORNSTEIN: Your Honor, if I may just make one
23 comment as --

24 THE COURT: Sure.

25 MR. BORNSTEIN: Thank you. Just -- well, I

1 actually have two quick comments. One is, with respect to
2 the custodial interviews, it's striking that regardless of
3 the contents, 16 of them haven't even happened yet, over two
4 months after the order was entered. I don't and haven't
5 heard a reason for that.

6 The other thing is Mr. Perry did just say that they
7 would have been done in three months with respect to the
8 650,000 emails. At minimum, we should get those in the
9 three months. There's no reason that the work being done
10 with respect to the other repositories should stand in the
11 way of getting done what they told the Court they could
12 accomplish, and that's setting aside the fact that they were
13 fully aware at the time of the existence of the
14 collaborative data sources which had been the subject of
15 testimony at the hearing.

16 Thank you for the indulgence, your Honor.

17 THE COURT: Okay. Thank you.

18 Does Apple want to address the issue of why one-third
19 of the custodians have not yet been interviewed?

20 MR. PERRY: Yes, your Honor. The protocol -- we
21 -- we built out the protocols for the review, for the
22 reviewers for the -- for the interviewers so that once the
23 -- the process started, everything could -- could run along.
24 That actually took a significant amount of time given the
25 nature of the case, including the privilege review, so that

1 we had the protocols in place. That is the -- the review
2 parameters for the entire project, because we only want to
3 do it once, and this is a point we have made with Epic over
4 and over again. We needed the custodians. We needed the
5 search terms. Then we needed the -- the review parameters.
6 That all took some time -- as I said, 1500 hours of outside
7 counsel time so far -- to get the system set up. It's also
8 the answer to the -- to Mr. Bornstein's issue about the
9 documents. We -- we want a uniform production here where
10 the same privilege standards, the same relevance standards
11 are being applied. The contract reviewers are great, but
12 they can only do a first level review. There's going to be
13 a manual review of many many of these documents. We're
14 doing test work. This is a -- this is a massive production
15 that has to be done very carefully in light of the privilege
16 issues. Judge Gonzalez Rogers has given us guidance on
17 privilege. We will follow it, but it is a -- it is
18 intensely manual, and we want to be consistent. We need --
19 we can't just put out 10 documents on a first round and then
20 see if it's going to be different later. So, that -- that
21 is the reason that we've built the -- we've built the system
22 first, and the custodial interviews literally, I mean, they
23 -- they are all scheduled. I already said that. They --
24 they will be done very quickly, but the -- this is all
25 because we had to get the system in place so that the

1 consistency can be done subject to the resolution of the
2 other two issues we have on the docket for today. Then --
3 then the process will finish. That's -- that's how we got
4 here.

5 THE COURT: Okay. Well, thank you.

6 So, I understand that Apple is doing a large document
7 review. I do not agree that it is a massive document
8 review. We're not talking about millions of documents. At
9 least as to custodial documents, it seems to be around
10 650,000 documents, more or less. I do understand that there
11 are a large number of custodians, and I'm aware of the
12 privilege issues that Apple justifiably has to be concerned
13 about. And then, of course, there are the -- the Quip and
14 Box searches as well.

15 But what Apple has described as the effort that it's
16 undertaking does not seem to me to require until December to
17 implement. Apple has a large amount of resources that it
18 can dedicate to this effort. And from counsel's
19 description, it appears that Apple has dedicated a large
20 amount of resources to this important endeavor, and I think
21 the issues that this discovery is about are important issues
22 that need to be addressed promptly. And, so, Apple needs to
23 do that.

24 And I'm not going to hold Apple to its estimate at the
25 May 31st hearing that it could complete document production

1 within three months. I understand that was a guess or an
2 estimate and that since that time, Apple has acquired
3 greater knowledge and there has been some refinement to what
4 Apple has agreed to produce. So, I'm not going to hold
5 Apple to that three-month estimate, and that -- that means
6 I'm not going to order Apple to complete discovery by the
7 end of August. But I'm also not going to give Apple until
8 December because, as I've said, the effort that Apple is
9 undertaking just doesn't need that kind of time.

10 And, so, what I'm going to order is for Apple to
11 substantially complete its document production by the end of
12 September. I think that provides a sufficient amount of
13 time for Apple to review all the documents to perform any
14 necessary privilege review to chase down the links and the
15 Quip and Box sources and to appropriately review documents'
16 full responsiveness and whether they ought to be produced.

17 So, that's going to be my order is for Apple to
18 substantially complete document production by the end of
19 September.

20 Now I would like to turn to ECF 1002, and that deals
21 with documents concerning Apple's responses to regulatory
22 options in other jurisdictions. And, first, I would like to
23 turn to Epic.

24 If you can help me to understand what is the specific
25 ask here. Is it true that the -- the -- once the custodians

1 are identified, that this issue about response to regulatory
2 actions outside the United States, does that implicate all
3 52 custodians or can you tell me who is implicated by this
4 issue?

5 MR. BORNSTEIN: Your Honor, we don't know
6 precisely who is implicated by the issue. It's certainly
7 our expectation that there is -- and Apple has informed us
8 that there is some overlap between the individuals who are
9 involved in the U.S. and the individuals who were involved
10 in the efforts to comply with foreign requirements. Apple
11 has said that that is at the senior level. We anticipate
12 there are going to be people at a more working level who
13 were involved in both efforts as well, but I don't know if
14 it's, you know, all 52 or all 51 for example. It's just not
15 visibility that -- that we have.

16 The requirements at issue in the foreign jurisdictions
17 that we are focused on are requirements with respect to
18 anti-steering rules, which is the subject of the Court's
19 injunction, and alternative payment systems, which is also
20 related to the Court's injunction, and in some
21 jurisdictions, those two matters were the subject of a
22 common -- a common order.

23 And, so, we expect that people who were involved in the
24 payment side of things at Apple, both on the engineering
25 level and the policy level, business level, and the steering

1 issues would be common at least to some degree across
2 jurisdictions because the subject matter is common across
3 jurisdictions.

4 THE COURT: All right. Thank you. Let me turn to
5 Apple, and I'll pose to you the same question that I posed
6 to Epic, which is which custodians are implicated by this
7 issue? Would it affect how you review the documents from
8 all 51 or 52 or is it a subset? If you can please chime in
9 on that.

10 MR. LO (via Zoom): Your Honor, Jason Lo on behalf
11 of Apple. I -- I generally agree with Mr. Bornstein's
12 answer. We are confident that there is some overlap, and
13 certainly at the higher levels there's going to be overlap
14 in the custodians.

15 Given the broad scope of the foreign jurisdiction
16 action such as the DMA and the work in the Netherlands, it
17 is certainly possible that even lower level employees may
18 have received documents and, therefore may have those
19 documents, but never really took in -- took them into
20 account for purposes of a U.S. injunction, and that's why
21 we're having the dispute that we are is because this is an
22 effort that -- it took a lot of effort in the company to
23 comply with the various regulations in the different
24 jurisdictions, and people were involved. But just because
25 they were involved in those jurisdictions doesn't mean that

1 they imported any of that into their work in -- in
2 connection with the injunction at issue here.

3 And I want to focus on the language that Epic put in
4 its letter brief, particularly in 1002, in terms of what the
5 testimony is in terms of the connection between, for
6 example, the DMA in the European Union and the Epic
7 injunction. All of the cited testimony and the documents
8 that they're referring to say that at a high level, when
9 Apple was trying to comply with Judge Gonzalez Rogers'
10 injunction, they wanted to make sure that the general
11 framework that Apple was putting forth in the United States
12 had some similarities and consistencies to the other
13 jurisdictions.

14 That was really the extent of the testimony, and that's
15 what they're pointing to. And even the documents that they
16 cite show that that's basically what Apple did. At a high
17 level, it looked to see, Okay, what we are doing here, is it
18 similar or is it dissimilar to what we are doing in -- in
19 the European Union. And those types of documents on their
20 face will show that comparison and that contrast. And,
21 again, for those types of documents where it specifically
22 references, for example, the DMA in the European Union and
23 then also says, Now, how does that compare to what we're
24 doing in connection with the Epic injunction, we have no
25 problems with that, and we agree that that is responsive.

1 What we do not agree to and where the fight is over is
2 you've got a document that is specific to the DMA, no
3 reference to what is happening in the United States. And
4 those types of documents we think are overbroad and not
5 responsive to the issues here. They filed a case under U.S.
6 law. They got an injunction under U.S. law. They actually
7 sought an injunction that was worldwide in nature, but the
8 Court only gave them an injunction in the United States.
9 And, so, anything that doesn't tie into Apple's efforts to
10 comply with the injunction we believe are not relevant and
11 would be extremely burdensome for us to both search through
12 those documents for even, for example, the anti-steering
13 documents that Mr. Bornstein talks about. And the reason
14 for that is the DMA is wide ranging. It does have those
15 provisions. Those have impacts on alternative payment
16 systems, but it's got a bunch of other provisions such as
17 relating to browser engines, to data sharing, and to other
18 issues.

19 And, so, the search terms and the relevance arguments
20 that Mr. Bornstein are making adds a -- adds a tremendous
21 burden on Apple to sort through that whole vast, you know,
22 system of documents with -- with very little return we might
23 add or we anticipate with very little return. Because these
24 are regulatory measures, we anticipate that a lot of these
25 documents will end up being privileged and logged. And, so

1 we would undertake a tremendous effort to search and to
2 review documents, and at the of the day, what that
3 ultimately changes is the size of the log, and the size of
4 the -- and the size of the production will not be
5 substantially different.

6 THE COURT: Well, here is a concern that I have.

7 MR. LO: Yes.

8 THE COURT: When Apple first takes a measure to
9 respond to a regulatory concern, for example, in the
10 European Union, presumably Apple does some analysis on its
11 options and the ways that it could respond, and that would
12 likely include the effect on Apple, potentially the effect
13 on competitors, the effect on the market, and what different
14 proposals, how those might have different effects on Apple
15 and -- and users and all of that stuff. And then, if Apple
16 subsequently as part of the injunction compliance in the
17 United States borrows from a measure it implemented in the
18 European Union, I wouldn't think that the very same Apple
19 employees who did that analysis for the European measure
20 would need to repeat all of that analysis when implementing
21 that measure in the United States. They would already know
22 all of that. They would -- it would -- the effect on Apple,
23 the effect on consumers, the effect on competition would
24 already have been vetted and analyzed, and presumably Apple
25 had reached a favorable conclusion when it implemented the

1 measure in the European Union, and then it would just do the
2 same thing in the United States.

3 Presumably, documents reflecting the analysis in the
4 European Union would likely not reference the U.S.
5 injunction because they might be earlier in time than
6 Apple's injunction compliance, but all of that analysis
7 would still be relevant to the U.S. injunction compliance.
8 It just wouldn't be restated because Apple would already
9 have done that analysis, and the people would already know
10 what it was. And, so, I'm worried that if I deny Epic's
11 request, then all of the initial analysis that went into
12 developing these measures gets lost simply because it
13 doesn't directly reference the U.S. injunction, even though
14 that analysis might be an important part of showing how
15 Apple decided to comply with the U.S. injunction.

16 So, if you could speak to that concern, that would be
17 helpful.

18 MR. LO: Yes, your Honor. Two answers to that.
19 First, I understand the concern that certainly something
20 earlier in time is not going to reference the compliance
21 with the U.S. injunction, but the reverse is not true, and
22 the documents that Epic cites to and the documents that were
23 presented at the hearing show that. In other words, where
24 the team in the United States was using evidence and data
25 from other jurisdictions as a starting point, as a point of

1 comparison, as a point of data analysis, those documents are
2 explicitly referenced, and they are in the keynotes, which
3 is Apple's versions of presentations. And they are in the
4 emails. That's the very type of documents that Epic is
5 citing in its bullet pointed list on pages one and two of
6 Docket 1002.

7 So, when Apple is importing its prior findings from
8 another jurisdiction, that's explicit on the face of the
9 document, and we -- we agree, and there's no disagreement
10 there.

11 My second answer to that, though, is we've already had
12 the hearing where Epic has called witnesses and examined the
13 witnesses, and the injunction compliance in the United
14 States had a host of different provisions and different
15 responses, and Epic was able to question a host of witnesses
16 about every single aspect of that. And there were answers
17 to every single aspect of that. In other words, in their
18 letter brief, they are not pointing out, Look, in the U.S.,
19 Apple put forth this thing, and when we asked witnesses
20 about it, they said, I have no idea other than this is what
21 we did in Europe, and I was told to do the same thing here.
22 That is not in their brief at all. There's no gap in the
23 evidence that they are pointing to that they don't know what
24 the rationale is.

25 At the end of the day, Epic and Apple will disagree

1 whether the rationale for its implementation is consistent
2 or inconsistent with the injunction. That's a decision that
3 obviously Judge Gonzalez Rogers needs to make, but they are
4 not pointing to any aspect of the implementation where
5 witnesses have not been able to say this was our rationale.
6 This is the data that supports it, and where a witness
7 purportedly said, The only thing I know is this is what we
8 did in the Netherlands, and I was told the same thing. So,
9 there's no gap in the data that they can point to in their
10 letter.

11 THE COURT: Well, but I don't know that that
12 really helps you because the whole concern is that, yes, of
13 course, the witnesses know what the analysis was that led to
14 the Action in the European Union because they were
15 participants in that, but Epic's ability to test or cross
16 examine that testimony would be hindered because Apple
17 hasn't produced the documents that went into the development
18 of the measures in the European Union. That would really be
19 the concern is about testing those -- those assertions.

20 MR. LO: Yes, but that's -- but all of these
21 arguments are being made in the abstract when the testimony
22 has already occurred. In other words, in their letter, Epic
23 doesn't point out, Here is the testimony that somebody said
24 we looked at and here's what we want to test. The -- the
25 implementations here that are really at issue are things

1 like here is the warning screen that is given to the user,
2 and so there were fights about whether that warning screen
3 was -- was -- was a scare screen, as Epic would -- would
4 term it, or a legitimate warning screen. And there was
5 testimony in terms of how Apple came up with that.

6 There were questions about the commission rate that
7 Apple instituted, and there were multiple decks and analysis
8 in terms of what the comparison points Apple made were in
9 order to reach that.

10 So, all of this in terms of what might have been is
11 actually not in the testimony. The only thing that the
12 testimony that they're pointing to says is, We came up with
13 a measure that we believe complied with the injunction. We
14 did want to look back and make sure that we were generally
15 consistent with the framework in other jurisdictions, and --
16 and that type of analysis is in the documents, and that type
17 of analysis we are doing.

18 But in terms of the suggestion that there is other
19 studies that were done in advance that people knew about in
20 their head and then imported into the United States, that's
21 nowhere in the testimony, and that's nowhere in -- in the
22 record, and they've already completed the examination of the
23 witnesses.

24 THE COURT: Well, but that's not in the record
25 because how could it be? Apple didn't produce those

1 documents.

2 Let me turn to Epic, if you would like to respond.

3 MR. BORNSTEIN: Thank you, your Honor. I'll start
4 by just saying we've had -- I want to come back to the
5 question of burden, which hasn't really been touched but I
6 think may cut through a lot of the issues here given that
7 Apple has said that on these issues there are only 21,000
8 unique documents on the analysis group side and only 71,000
9 unique documents on -- sorry. These are on the -- on the
10 search terms.

11 On the issue of the -- the foreign jurisdictions, a
12 couple of things. Number one is I agree with the analysis
13 that your Honor laid out in terms of why we need to have
14 these documents, so that we can fully understand and the
15 Court can fully understand the bases on which the decisions
16 were made.

17 We are not the ones who introduced the relevance of the
18 foreign compliance efforts into this case. In Apple's very
19 first filing on January 16, in its brief and in the
20 supporting declaration from the Apple employee, Mr. Fisher,
21 Apple indicated that these foreign efforts provided the
22 framework for and were the basis for the injunction
23 compliance efforts in the United States.

24 We now have some documents, in part because Judge
25 Gonzalez Rogers required their production, that support that

1 point, that show that during the course of the U.S.
2 injunction compliance effort there were references to and
3 drawing upon the work that was done in other jurisdictions.

4 Your Honor is exactly right that it's not the case that
5 each time there's a reference to, for example, what was done
6 in the Netherlands, Apple repeated every single fact about
7 the analysis in the Netherlands in that document. I'll give
8 a -- a concrete example.

9 In the initial January 16 filing, Apple produced
10 something called the Price Committee Deck. I believe the
11 substance of that deck is confidential. So, I will be
12 careful here on the record.

13 But there -- this I know came out in the hearing.
14 There was no reference in that produced version of the deck
15 to -- to the Netherlands or the efforts in Korea after Judge
16 Gonzalez Rogers ordered a production of a prior iteration of
17 that deck. It was evident that both of those matters were
18 relevant to the work that Apple was doing, that references
19 to Netherlands and Korea were in there. They were the
20 subject of testimony at the hearing. So, I know I'm not
21 violating the protective order here.

22 And that came out only because we got the documents.
23 We otherwise never would have known. And the document --
24 Mr. Lo is correct. The document does not recite all of the
25 prior information. It doesn't need to. As Mr. Schiller

1 (phonetic), the witness who testified at the hearing, said
2 on the stand, I knew what the work was in the past because I
3 was involved in it, and, so, I was aware of it when we were
4 analyzing this in the United States.

5 So, if, for example, there had been work done in the
6 Netherlands or in Korea or in Europe or in Japan to
7 understand likely developer adoption of the measures that
8 were being put in place, either the price or the other
9 restrictions on -- on links and so forth, if that work had
10 been done, that is work that the people responsible for
11 U.S. injunction compliance would have been aware of. It
12 formed part of the -- the basis for the decision that was
13 made in the Netherlands and in Korea and Japan and in
14 Europe, and then, when they have a deck that says, Hey,
15 look, we've got the same price as we have in those other
16 jurisdictions, they don't need to say, And, hey, remember
17 when we did the work in the other jurisdictions, this is
18 what our analysis showed about developer adoption.

19 So, if -- if there is work that was done -- and we have
20 every reason to believe there is -- to support the foreign
21 injunction compliance, that's work that's going to be
22 relevant to show Apple's expectations, Apple's intent, and
23 the likely effect of the work that was done here in the
24 United States, and there's no reason to think it would be
25 repopulated over and over each time the U.S. work had been

1 done by people like Mr. Schiller and others who were
2 involved in both efforts.

3 And, as for whether or not this is in the record, Mr.
4 Lo's final point, two -- two observations. One is to the
5 extent it's not in the record now, it's because we haven't
6 been given the documents, right. And we do need to test it,
7 as your Honor has said.

8 And the other point is we're not done examining these
9 witnesses. I'm not sure why Mr. Lo made that point. Some
10 of these witnesses have been expressly held open by Judge
11 Gonzalez Rogers subject to the production of documents. So,
12 we certainly intend to ask additional questions of the
13 witnesses once we get the materials the Court has ordered to
14 be produced.

15 THE COURT: All right. Thank you.

16 Mr. Lo, would --

17 MR. LO: May I --

18 THE COURT: -- you like to respond?

19 MR. LO: Yeah. One -- two quick points, your
20 Honor. First, I do want to draw a distinction between the
21 work that is occurring in the European Union and the work
22 that's referenced in terms of Netherlands and other
23 jurisdictions.

24 Apple's DMA work came -- compliance with the DMA came
25 after the work that it did to comply with the Judge's

1 injunction. So, the suggestion that that would have
2 informed the work here doesn't work that way. So, we do
3 believe that at the minimum, the DMA should be treated
4 differently because that compliance work happened after the
5 work that was completed for the United States.

6 The second point is that all of these things in terms
7 of whether there is likely -- likely adoption, there's no
8 evidence in the record that that exists. They never asked
9 any questions about that or they certainly haven't cited any
10 questions about that.

11 But, more importantly, the documents that have been
12 produced so far -- and they have been produced and will be
13 produced pursuant to the other search terms, for example,
14 just things relating to the compliance -- injunction
15 compliance in the U.S. and the code names for that show that
16 when there was relevant evidence, there was no effort to
17 hide that or to just say wink, wink, nod, nod, remember we
18 did that.

19 When Apple was taking into account the data that had
20 accumulated earlier or when it was making a comparison, it's
21 obvious on the face of the documents, and that -- those
22 documents have been produced, and similar documents will be
23 produced. So, the suggestion that perhaps there's more out
24 there, that -- that people are just intuitively knowing,
25 there's no suggesting that that's the case either in the

1 testimony or in the actual documents that have been produced
2 so far and will be produced.

3 THE COURT: All right. Thank you, Counsel.

4 I am going to rule in Epic's favor on this issue. I
5 think that when Apple, as part of its U.S. injunction
6 compliance adopts measures that are similar to measures it
7 has adopted in other jurisdictions, that renders the
8 analysis in discussion about the measures when they were
9 adopted in the other jurisdictions irrelevant. There's no
10 reason to assume that Apple would repeat all of that prior
11 analysis when it imports a measure that it used elsewhere
12 into the United States, and I think that walling off that
13 evidence would unfairly deprive Epic of documents that would
14 likely be relevant to why Apple did things, what its
15 analysis was, its effect on developer adoption and other
16 issues that are relevant to injunction compliance. So, I'm
17 going to rule in Apple's favor on that issue -- sorry -- in
18 Epic's favor on that issue.

19 Let's turn to ECF Number 1003. That is a dispute about
20 two proposed search strings, and it looks like from the hit
21 counts one of them gets 21,200 unique hits, and the other
22 gets 71,200 unique hits. That's a fair number of documents,
23 but it's not a huge number of documents, and it does seem
24 like the search strings aim at important issues in the case.
25 So, my thought is that Apple should implement those search

1 strings. It doesn't seem overly burdensome, but let me turn
2 to Apple for your thoughts.

3 MR. LO: Thank you, your Honor. And may I ask a
4 point of clarification about your prior order, because it
5 might affect my argument here, which is that I heard Mr.
6 Bornstein say that primarily what they're interested in in
7 Apple's work in foreign jurisdictions is those aspects that
8 are similar to what is at issue here, meaning the steering
9 provisions and the alternative payments. In other words, I
10 don't think he's interested in the data protection and the
11 browser engines in the other jurisdiction.

12 So, if the Court's order in terms of relevance can be
13 limited to that, then on the search terms, what I would
14 suggest is that Epic and Apple then negotiate whether there
15 are particular limiters that would limit, for example, the
16 DMA work and the analysis group work to the things that are,
17 you know, broadly related to the steering provisions and
18 alternative payment mechanisms.

19 THE COURT: Well, I'll let Epic speak to that in a
20 minute. The way I had understood the dispute is that Apple
21 has to produce all documents relevant to its proposed
22 injunction compliance and that the issue is when that
23 injunction compliance results in the adoption in the United
24 States of something that was done elsewhere, then Apple is
25 asking me to say that only if there's a direct reference to

1 the U.S. injunction would the documents about elsewhere
2 become relevant, and Epic is saying, no, it would -- the
3 documents about elsewhere would be relevant whether or not
4 they refer to the U.S. injunction. But all of this is
5 bounded by the more basic relevance subject of compliance
6 with the U.S. injunction. So, if Apple did something
7 elsewhere that has nothing to do with how it complied with
8 the U.S. injunction, I would think those documents would
9 just fail the basic relevance inquiry that is the whole
10 reason we're -- the whole thing that we're talking about.

11 But let me turn to Epic. What are your thoughts?

12 MR. BORNSTEIN: Yes. Thank you, your Honor. It
13 is my understanding that this is an agreed issue already
14 which may alleviate Mr. Lo's concerns, and it's very close I
15 think to what your Honor just articulated is what the
16 parties had agreed, but to put a little bit of concreteness
17 around it, the efforts in Japan, in the Netherlands, and in
18 Korea overlap with the -- the efforts here in the United
19 States in the sense that they relate to anti-steering and
20 alternative payment issues.

21 The DMA, as Mr. Lo says, is a broader statute in the
22 European Union, but the parties have discussed that, and we
23 did agree that any aspects of Apple's DMA compliance on
24 issues other than anti-steering or alternative payment need
25 not be produced.

1 So, to the extent, for example, there is an issue
2 around alternative app stores that arises from the DMA,
3 that's not something that we have asked Apple to -- to
4 produce in this matter.

5 THE COURT: I see. So, then let me -- I'm
6 wondering if I should put language in my order -- when I
7 refer to similar -- Apple's responses to similar regulations
8 in other countries, should I reference, say, with respect to
9 anti-steering and alternative payments?

10 Epic, do you think that would reflect the parties'
11 agreement?

12 MR. BORNSTEIN: I do, your Honor.

13 THE COURT: And would that address Apple's
14 concerns about vagueness?

15 MR. LO: It -- it would -- it would, your Honor.

16 THE COURT: All right. Let me just make a note.
17 Okay. Then I'll -- I'll limit the order in that respect.

18 Are we now ready to turn to -- to ECF 1003 and get
19 Apple's thoughts on that?

20 MR. LO: Yes. Thank you, your Honor. And that's
21 why I wanted to ask that question first because, given that
22 limitation -- well, first, let me address the Court's
23 concerns about the burden.

24 In the context of what we're already doing in the
25 context of deadline, we do think that roughly 100,000

1 documents is an additional burden and is a material burden,
2 but it's not just a burden in terms of the cost of reviewing
3 it, which is obviously something we don't have to do. We do
4 anticipate that a lot of these documents are going to need
5 careful review for privilege and may result in privileged
6 logging. And, so, it's -- we anticipate that a large
7 majority of these will require burden, not just the initial
8 review but also in terms of logging and checking for
9 privilege claims.

10 And, so, the reason I wanted the clarification in terms
11 of 1002 is, given that clarification, again, we -- we have
12 always said we are willing to search for analysis group and
13 things like the DMA in conjunction with certain limiters,
14 and what I would suggest, your Honor, is that given the
15 limitation that your Honor is putting in with respect to
16 1002, I think Apple and Epic can agree on additional
17 limiters with respect to 1003 search terms so that we can
18 clearly get rid of some of the things that will not have a
19 bearing on alternative payments and on anti-steering.

20 THE COURT: Let me make sure I understand what the
21 ask is. With respect to ECF 1003, is Apple asking me to
22 order the parties to meet and confer further?

23 MR. LO: Yes. To -- to add limiters to the
24 analysis group and the DMA search terms to reflect the
25 Court's ruling 1002.

1 THE COURT: And what is Epic's response?

2 MR. BORNSTEIN: Your Honor, this is not a new -- a
3 new outcome. We don't think further meeting and conferring
4 and further delay is necessary. What the Court has just
5 ruled, as Mr. Lo put it, on 1002 is something the parties
6 had already agreed to.

7 In terms of the scope of the production to be done or
8 the relevance review to be done with respect to the foreign
9 compliance efforts, I'll add that the analysis group work is
10 not impacted by the ruling on -- on 1002. That's separate
11 from the foreign compliance efforts that are implicated by
12 the DMA search terms and the code name search terms for the
13 DMA that are in 1003.

14 But I think further delay and further meeting and
15 conferring on these when we have a universe of if you put
16 them both together, and I don't know if they both go
17 together completely or if there's some overlap, whether you
18 give Apple the benefit of the doubt and say about 92,000
19 unique documents.

20 In the context in which Judge Gonzalez Rogers has
21 ordered Apple to make a production to err on the side of
22 being overly broad when there is a concern, that number does
23 not strike me as -- as unduly burdensome.

24 If it is, in fact, the case that there are a lot of DMA
25 or analysis group documents that don't have to do with

1 alternative payments or don't have to do with anti-steering,
2 there's no privilege review necessary. Those can easily be
3 put to the side. The privilege review would become
4 necessarily only when the documents are -- are relevant.
5 So, that concern in terms of scope of privilege review is
6 not going to change whether we have limiters or not. The
7 only issue at play with the limiters is the scope of the
8 responsiveness analysis, and if it really is the case that
9 there are aspects of the DMA or the analysis group documents
10 that don't relate to the issues in play in the Court's
11 injunction, it will be very easy for reviewers at Apple to
12 set those to the side.

13 Our concern is that we're going to miss important
14 documents if we don't have the search terms we're looking
15 for, as shown already by the documents referenced in the
16 letter that we submitted to the Court where there are
17 important documents that we've received as a result of the
18 Court's orders previously that would not have been captured
19 by the search terms and the limiters that Apple proposed to
20 us.

21 THE COURT: Let me hear Apple's response,
22 including your response to the specific documents that Epic
23 refers to that they say would not have -- that were relevant
24 but that would not have turned up in your proposed search
25 terms?

1 MR. LO: Well, they -- they -- first of all, they
2 would not show up in the proposed search terms in the letter
3 brief, but I think they probably would show up in response
4 to what I'm suggesting now in response to the Court's ruling
5 on 1002, which is if it relates, for example, to the DMA and
6 also relates to anti-steering or alternative payments. So,
7 that's number one.

8 Number two, what Epic fails to mention is that there
9 are a host of other search terms, and those other search
10 terms already did and would capture these very documents.
11 So, yes, in -- in the specific terms that we had proposed in
12 the letter, which I don't think are at issue currently, they
13 would not have been captured, but they would have been
14 captured by the many other terms that the parties had
15 already negotiated and agreed upon. So, we -- we did
16 confirm that those documents would have been captured by
17 other search terms, and I think they would be captured by
18 the search terms that I am proposing now.

19 In terms of the substance of Mr. Bornstein's argument,
20 I think we are all agreed that regulatory measures such as
21 the DMA include a host of other things that are absolutely
22 unrelated to it, and I think that there are -- we already
23 have search terms and -- and phrases in other search terms
24 that are intended to get -- filter out the things that we
25 all agree are not relevant here, you know, browser engines,

1 data privacy, data sharing, and things like that. And, so,
2 what we are asking for is simply reasonable limitations on
3 terms so that we're not required to filter through all of
4 those documents and can get out and can look at the
5 documents that actually do relate to alternative payment
6 systems and -- and steering provisions in other
7 jurisdictions and get those out quickly.

8 There seems to be no benefit to either side to -- to
9 have a delay in having us look at all of the DMA related
10 documents when everybody knows that it's a broad ranging
11 regulatory measure. And -- and, frankly, I don't think I'm
12 saying anything surprising. There were other -- many more
13 perhaps difficult and controversial portions of that that
14 are not at issue in this particular case.

15 THE COURT: All right. Well, thank you, Counsel.

16 I'm going to rule in Epic's favor on this issue.
17 Search terms are -- are useful, but they're not intended to
18 be perfect. They are a first step at going through
19 custodial documents and a measure to identify what are the
20 documents that should be reviewed to see if they're relevant
21 or not, and search terms will necessarily capture some
22 documents that aren't relevant. That's why Apple's doing
23 the relevance review after it runs the search terms and sees
24 what documents come up in them.

25 The -- the particular search terms here are important

1 ones. They -- they are very important to the U.S.
2 injunction compliance, and, so, I agree that Epic's proposed
3 search terms are appropriate here given the importance of
4 these issues.

5 The hit counts aren't so high that just looking at
6 those numbers I can conclude that the search terms are
7 improper. There are about -- if you add the two numbers
8 together -- and, as Epic says, I'm not sure that that's
9 right, but if you did, it's about 92,000 documents. That's
10 not huge. It's a large number of documents, but it's not
11 huge, and given the importance of these particular issues, I
12 think requiring Apple to review those documents to see which
13 ones are relevant and should be produced is a worthwhile and
14 proportional endeavor. So, I'm going to rule in Epic's
15 favor on that issue as well.

16 That addresses the joint discovery letter briefs that
17 are on file in front of me. One thing I want to do is to
18 get some previewing by the parties if you think there may be
19 further issues coming up down the line. You don't have to
20 identify any if you -- if none come to mind, but I wanted to
21 give you the opportunity just to apprise me if there are
22 likely other disputes that may be coming up.

23 So, let me turn first to Epic. Are there other further
24 disputes you see coming up that you would like to alert me
25 to?

1 MR. BORNSTEIN: I'm not currently aware of
2 anything, your Honor, other than the continued concerns that
3 we have over how the searches are being done with respect to
4 the collaborative data sources, but we are discussing with
5 Apple and I'm hopeful we'll get to resolution and don't have
6 anything to drag to the Court with sufficient specificity
7 now. We are, of course, looking at Apple's privilege log,
8 and we will speak to Apple first, of course, if we have
9 concerns. We haven't done that yet, but that's something
10 that I anticipate given what we've heard from Apple again
11 and again about privilege in this matter could become an
12 issue, but we don't have anything to raise at this point.

13 THE COURT: Okay. Thank you.

14 Let me turn to Apple. Are there any discovery issues
15 that you see percolating that you would like to preview for
16 me today?

17 MR. PERRY: Your Honor, I think between the
18 parties' agreements and the Court's rulings today, there are
19 no outstanding issues from Apple's perspective regarding
20 this production.

21 THE COURT: Okay. Well, thank you, Counsel. If
22 further issues arise, please meet and confer promptly. And
23 then if you're not able to resolve them, please get a joint
24 discovery letter brief on file promptly.

25 It's important to keep the discovery process moving,

1 and I don't want things to be held up by disputes. So, if
2 further disputes arise, please quickly see if you can work
3 them out, and if you're not able to, then promptly get a
4 joint discovery letter brief on file with the Court, and we
5 can take it from there.

6 MR. BORNSTEIN: Thank you very much, your Honor.
7 And just by way of clarification, it is the parties'
8 understanding when we were discussing this earlier in the
9 week that the Court would like to continue receiving the bi
10 -- biweekly status reports. Is that correct?

11 THE COURT: I would like to continue receiving
12 those. I find those helpful, and I want to be apprised of
13 the status of the document production. So, yes, please
14 continue to file those.

15 MR. BORNSTEIN: Thank you, your Honor.

16 MR. PERRY: Thank you, your Honor.

17 THE COURT: All right. Thank you, Counsel. The
18 Court will issue a written order likely later today. Thank
19 you. The matter is submitted.

20 MR. LO: Thank you.

21 THE CLERK: Thank you everyone. We're off the
22 record. Court is in recess.

23 (Proceedings adjourned at 10:18 a.m.)

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1 CERTIFICATE OF TRANSCRIBER

2

3 I certify that the foregoing is a true and correct
4 transcript, to the best of my ability, of the above pages of
5 the official electronic sound recording provided to me by
6 the U.S. District Court, Northern District of California, of
7 the proceedings taken on the date and time previously stated
8 in the above matter.

9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action
11 in which this hearing was taken; and, further, that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

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Echo Reporting, Inc., Transcriber

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Tuesday, August 13, 2024

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